NO. 87-440

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

EUGENIE J. HUGER,
Petitioner

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States effected a "taking" of petitioner's private property without payment of just compensation as required by the Fifth Amendment when it failed over a twelve (12) year period to either acquire or seek condemnation of the property after (1) designating the property as part of a wildlife refuge area and publicly announcing that it would acquire the property; (2) negotiating (after seven (7) years) an acquisition price for the subject property but failing to conclude acquisition at the agreed price because of unavailability of funding; and (3) leaving the petitioner to file this inverse condemnation action to force action toward acquisition (almost five (5) years after agreeing on acquisition price), under circumstances wherein the federal agency seeking acquisition of the subject property never developed a plan of acquisition to assure timely acquisition and availability of funding.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISION INVOLVED 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE WRIT 6

I. The decision below emasculates Fifth Amendment protection of private property rights against governmental abuses in the eminent domain process 6

II. The decision below conflicts with enunciated policy of the Supreme Court in its interpretation of Fifth Amendment taking issues 11

III. The instant case affords an important opportunity for the Supreme Court to provide direction to the emerging case law in the inverse condemnation area 13

APPENDIX

I. Opinion of United States Court of Appeals for the Federal Circuit Dated June 16, 1987 I-1

II. Order and Opinion of United States Claims Court Dated November 6, 1986 ..... II-1

III. Judgment of United States Court of Appeals for the Federal Circuit Dated June 16, 1987 ..... III-1

TABLE OF AUTHORITIES

CASES CITED

Agins v. City of Tiburon, 447 U.S. 255 (1980) 12
Althaus v. United States, 7 Cl.Ct. 688 (1985) 9, 13
Benenson v. United States, 548 F.2d 939 (Ct.Cl. 1977) 13
Drakes Bay Land Company v. United States, 424 F.2d 574 (Ct.Cl. 1970) 7, 13
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781 (U.S. June 9, 1987) 12
Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984) 7,10
Nollan v. California Coastal Commission, 55 U.S.L.W. 5145 (U.S. June 23, 1987) 12
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 7, 8
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 11
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 6
Whitney Benefits, Inc. v. United States, 752 F.2d 1554 (Fed. Cir. 1985) 13
Yuba Goldfields, Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983) 11, 13

CONSTITUTIONAL PROVISION CITED

U.S. Const. Amend. V ..... 2, *passim*

STATUTES CITED

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1491 2

In the Supreme Court of the United States

OCTOBER TERM, 1987

EUGENIE J. HUGER,
Petitioner

VS.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Eugenie J. Huger, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit dated June 16, 1987, affirming order of the United States Claims Court granting summary judgment to the respondent United States.

OPINIONS BELOW

The United States Claims Court's order and opinion granting summary judgment was filed November 6, 1986, is not published, and appears as Item II in the Appendix. The opinion of the United States Court of Appeals for the Federal Circuit, affirming the Claims Court decision, is dated June 16, 1987, is not published, and appears as Item I in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit herein is dated June 16, 1987, and appears as Item III in the Appendix.

This Court's jurisdiction to review the judgment by writ of certiorari is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE[1]

Petitioner, Eugenie J. Huger, invoked the jurisdiction of the United States Claims Court pursuant to the Tucker Act, 28 U.S.C. §1491, complaining that the

[1] Record citations are to the Appendix (R.A.) and the Supplemental Appendix (R.S.A.) filed in the United States Court of Appeals for the Federal Circuit. The Record is retained in the United States Claims Court. The Appendix and Supplemental Appendix contain parts of the Record jointly designated by the parties pursuant to the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Federal Circuit.

United States had taken her private property for public use without just compensation in violation of the Fifth Amendment of the United States Constitution. The subject property consists of 280 acres in Jackson County, Mississippi, and was designated as a part of the Mississippi Sandhill Crane National Wildlife Refuge by the United States Fish & Wildlife Service, Department of the Interior (the "United States").

The United States never adopted a plan of acquisition for the refuge area (R.S.A. 2, 7), although it was to expend 20 million dollars and acquire 16,588 acres.

Although the United States announced the establishment of the refuge area in 1973, it had not acquired nor filed condemnation action against the petitioner's 280 acres as of October 4, 1985, when petitioner instituted her "inverse condemnation" suit in the Claims Court.

The principal actions taken by the United States with respect to the subject 280 acres during this 12-year period are as follows:

> August 1973: refuge area established (R.A. 38, 48);
>
> January 1974: release of official refuge map, including subject 280-acre tract (R.A. 39, 50);
>
> September 1974: correspondence to petitioner expressing interest in acquisition (R.A. 54);
>
> December 1974: offer of $475.00 per acre for the subject tract. Rejected. (R.A. 54);
>
> November 1978: offer of average of $1,200.00 per acre for subject tract and 360 additional acres owned by petitioner in the refuge area. Rejected. (R.A. 55);
>
> January 1979: correspondence to petitioner: "We are going to complete the acquisition of

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all inholdings at the Refuge during this fiscal year either by negotiated settlement or by eminent domain." (R.A. 55);

April 1980: offer of $1,000.00 per acre for subject tract. Rejected. (R.A. 55);

October 1980: United States representative states he will recommend for approval average price for all of petitioner's land in the refuge area, including the subject tract, of $1,689.00 per acre (R.A. 55 - 56);

January 1981: the same United States representative advises that his recommendation has been rejected but that an Agreement for the Purchase of Lands is acceptable at a consideration of $944,450.00 for all of petitioner's property (R.A. 56);

April 1981: United States advises petitioner that it does not have sufficient funding to acquire all of petitioner's property at the agreed price (R.A. 56);

May 1981: United States agrees to acquire 360 acres of petitioner's property, but not the subject 280 acres due to insufficient funds (R. A. 56);[2]

April 1984: United States advises petitioner that it now has funds to acquire the subject 280-acre tract (R.A. 56);

May 1985: United States offers $800.00 per acre for the subject property. Rejected. (R.A. 57);

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[2] A total of $572,113.75 was allocated to the 360.01 acres acquired from petitioner ($1,589.16 per acre) and $372,336.25 to petitioner's remaining 285.12 acres ($1,305.89 per acre) (R.A. 56). The United States later deleted 5.12 acres of this property from its proposed acquisition.

October 1985: petitioner files inverse condemnation action in the Claims Court;

November 1985: United States files straight condemnation action with respect to subject property, which is stayed pending outcome of this case.

The public announcement by the United States of the wildlife refuge area terminated all arms' length private sale activity of refuge-designated property in the refuge unit including petitioner's 280-acre tract (the Ocean Springs unit).[3] During the years 1974 - 1985, inclusive, 22 transfers of real property occurred within the boundaries of the Ocean Springs unit of the refuge area, of which 17 were to the United States or The Nature Conservancy for the refuge area; three were intrafamily transfers; and two were transactions in which the refuge property was only a small part of a large conveyance consisting principally of lands outside the refuge area (R.A. 65 - 66). In contrast, at least three parcels of land within one-half mile of petitioner's property but outside the refuge area have been sold since 1983 and an 80-acre tract within one-quarter mile of petitioner's property but outside the refuge area has been subdivided and sold as lots during the period 1976 to 1985. Moreover, a new high school facility has been constructed within one-half mile of the subject property and substantial residential development has occurred in a nearby subdivision (R.A. 67 - 68).

All of the foregoing facts were properly presented to the Claims Court in opposition to motion for summary judgment filed by the United States. The Claims Court

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[3] Typical public reporting: "The [wildlife refuge] plan was also a severe blow to any future development in the area because of the restrictions which are included in a critical habitat designation," *South Mississippi Sun*, July 20, 1977; "The habitat designation will mean that property in that given area can be utilized for only limited uses," *Mississippi Press*, May 27, 1976.

granted the summary judgment motion. The United States Court of Appeals for the Federal Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. The decision below emasculates Fifth Amendment protection of private property rights against governmental abuses in the eminent domain process.

The Fifth Amendment stands between the private citizen's property rights and the abuse by government of its power to require usage of that property for a public purpose.[4] This Court stands between one private citizen and a severe infringement of her property rights by a gross abuse of power by the United States in the manner in which it sought to take her property. By granting certiorari and speaking to the rights of that private citizen — petitioner in this case — the Court can establish that the manner in which the United States or any other governmental body with eminent domain power seeks to exercise that power is subject to constitutional scrutiny and abuse of that power will not be sanctioned. By refusing certiorari, the Court acquiesces in a Fifth Amendment interpretation which:

(1) allows governments to delay for up to 12 years before acquiring at an agreed price or seeking by condemnation private property which it has made public its intention to acquire;

(2) allows a government policy of "waiting out" the private citizen whose property it seeks, chilling and paralyzing the usage or sale of that property by its public announcement of its

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[4] "That Clause [the Taking Clause of the Fifth Amendment] stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

intended taking, but delaying the taking until the citizen acquiesces in the government price;

(3) allows governments to negotiate for and agree with private property owners on an acquisition price with no means of funding the acquisition;

(4) allows governments to proceed with no plan of acquisition in seeking to acquire thousands of acres of land at a cost of millions of dollars, inviting the unconscionable delay and the unavailability of funds which characterize this case.

The opinion of the Court of Appeals for the Federal Circuit employs a wooden application of two United States Supreme Court decisions, *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The Appeals Court recites that the petitioner's evidence suggests merely that the action of the United States may have lessened the market value of the subject property, and cites *Kirby Forest* to the effect that impairment of market value in the absence of interference with an owner's right to dispose of the land does not constitute a Fifth Amendment taking. The evidence submitted by the petitioner does not suggest a mere lessening of the market value of the subject property; it demonstrates an inability to market the property to any party other than the United States. Reasonable persons do not purchase property designated for eminent domain.[5] From the time of the public announcement by the United States of the designation of the refuge area in this case, there was not a single arms' length sale to any private party of any piece of

[5] *See Drakes Bay Land Company v. United States*, 424 F.2d 574, 586 (Ct.Cl. 1970): "This plaintiff remains without a market for its land. The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation . . ."

property in the unit of the refuge area including petitioner's property. Petitioner's Fifth Amendment rights should not depend on the charade of a futile attempt to sell her property under such circumstances.

The Appeals Court recites that petitioner offered no evidence tending to establish that she had any distinct investment-backed expectation with which the United States interfered, as it said was required to find a "taking" in the *Penn Central* case. *Penn Central* did not single out interference with investment-backed expectations as the only test for inverse taking but noted other factors to be considered, economic impact and character of the governmental action in question, both of which factors as applicable to petitioner are discussed below. Further, the facts of the *Penn Central* case are inapposite to those in the case at bar. There the Court was called upon to determine whether a regulation or restriction on usage of property effected a taking. The case before the Court does not complain of any such restriction or regulation, but rather of twelve (12) years of a condemnation cloud which, regardless of petitioner's expected usage of the land in 1973, absolutely assured that she could develop no distinct investment-backed expectation, other than a sale to the United States. Reasonable investors do not back development of land designated for eminent domain.

The public declaration by the United States of its intention to acquire private property for a public purpose in effect grants it an option to acquire the property, for which it pays no consideration. Granted the option is not exclusive, but it defies reason to postulate a purchaser interested in acquiring property known to be designated for taking by the United States or any other governmental body with eminent domain power. It likewise defies reason to postulate a private property owner who, in the face of a government-declared intention to take property, would undertake to improve or

develop it in any way.[6] When the United States or other governmental body asserts its option by publicly declaring its intention to acquire property, a private citizen has two options: (1) accept a price agreeable to the governmental body, or (2) reject the government price and hope for a more favorable court award by eminent domain. The decision of the Court of Appeals sanctions adoption of a government policy to "wait out" a private citizen who will not accept the government price for a period of up to 12 years. If the landowner cannot wait out the governmental body adopting that policy, and has to sell, the only option is to sell at the government price. The Appeals Court has said that inverse condemnation will not lie. True, in the case at bar, there is a pending condemnation suit — but it was filed after the landowner filed her suit, and probably would not have been filed when it was had the landowner not forced the government's hand. It is not right to place the burden on the private citizen, whose land the

[6] One can certainly envision the connivance by a landowner facing eminent domain of some development of the affected property to enhance its eminent domain value. But it is submitted that most honest and reasonable citizens improve or develop property with some consideration to the permanency of what they are doing, and in the face of an imminent taking by eminent domain, do not proceed to do so. *See Althaus v. United States*, 7 Cl.Ct. 688, 696 (1985): "Plaintiffs would be imprudent indeed to invest effort or money in construction, planning, subdivision or any other potentially incompatable activity. The same goes for any putative purchaser." (emphasis added).

government seeks to acquire, to force the government's hand.[7]

The Appeals Court recites that petitioner did not allege failure by the United States to act in "good faith." The United States did not act in good faith when it acquired its no-consideration option in 1973 and adopted a "wait out" the property owner posture for 12 years. The United States did not act in good faith when, after seven years of on-again-off-again negotiations with the petitioner, it agreed to a price of $1,300.00 per acre for the subject property, but found itself unable to consummate the purchase because of unavailability of funds. The facts are undisputed that this agreement as to value was reached and embodied in an Agreement for the Purchase of Lands signed on behalf of the petitioner by her counsel, but not ultimately approved by the Government, only because of lack of funds to complete the acquisition at that time. It is this date (April 22, 1981) which petitioner contends was the date of taking of her property. The United States never prepared a plan of acquisition for the land in this wildlife refuge area. It is reasonable to assume that had it done so, it would not have run out of funds or would never have agreed to a valuation of petitioner's property and found itself unable to complete the acquisition. Even if the unavailability of funds were for other reasons — a freeze on spending ordered by the President, or a failure of Congress to appropriate — it is submitted that the offense

[7] There is language in *Kirby*, *supra*, which suggests that the landowner there should have threatened to cut timber on its property — after an eminent domain award — to force the government to consummate acquisition by paying the award. While petitioner vehemently disagrees with such a suggestion, the present case is distinguished by the absence of even a pending condemnation action, much less a completed action and award. Cutting timber may not be to the landowner's ultimate economic benefit and it is simply wrong to suggest she should do anything to force the government to act reasonably and responsibly in pursuing acquisition of private property for a public purpose.

to the right of the private landowner is the same. The petitioner found herself negotiating with the United States to acquire her property. That aligned her as one party to a negotiation, the other side of which included the Fish & Wildlife Service, the Department of the Interior, the United States Congress, the President and the virtually unlimited resources of the United States government. For the Appeals Court to suggest that because the Fish & Wildlife Service representative may have negotiated in "good faith" because he was personally unaware of the lack of funds to acquire petitioner's property, ignores that any citizen dealing with the United States deals with a many-faceted body.[8] It was bad faith, gross disregard of petitioner's rights and a disgrace for the United States to dangle her property on a string for 12 years, to agree on price and fail to purchase because of lack of funds, to adopt no plan of acquisition and in effect attempt to "wait out" the petitioner seeking her acquiescense in the government price.

II. The decision below conflicts with enunciated policy of the Supreme Court in its interpretation of Fifth Amendment taking issues.

While the Appeals Court opinion cannot be said to be in conflict with prior decisons of this Court, it is clearly contrary to the enunciated policy of interpretation of the Fifth Amendment articulated by this Court. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Mr. Justice Holmes, writing for the Court, observed:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way

[8] "The United States calls upon unlimited resources. In a property conflict, it carries the ultimate weapon, the power of eminent domain." *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 (Fed. Cir. 1983).

> of paying for the change. As we have already said, this is a question of degree -- and therefore cannot be disposed of by general propositions. 260 U.S. at 416.

The Appeals Court opinion is nothing more than expression of three general propositions — fluctuation in value, investment-backed opportunity, good faith; it ignores questions of degree entirely. This Court has noted that the question of the degree of delay in the context of taking litigation can be determinative. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980), where Mr. Justice Powell wrote:

> Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are "incidents of ownership." 447 U.S. at 263 n.9. (emphasis added).

It is hard to imagine that 12 years is not extraordinary delay.

Finally, this Court has demonstrated that the circumstances involving government encroachment on private property rights will be carefully scrutinized in *Nollan v. California Coastal Commission*, 55 U.S.L.W. 5145, 5148 (U.S. June 23, 1987) (government not allowed to condition land use permit to property owner in manner not designed to further purpose of land use regulation requiring permit); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 55 U.S.L.W. 4781, 4786 (U.S. June 9, 1987)

(temporary regulatory taking held compensable under Fifth Amendment).[9]

III. The instant case affords an important opportunity for the Supreme Court to provide direction to the emerging case law in the inverse condemnation area.

There is an emerging body of case law dealing with Fifth Amendment protection of private property rights against government abuse in the manner of seeking acquisition for a public purpose. *See, e.g., Althaus v. United States*, 7 Cl.Ct. 688 (1985) (prolonged 10-year threat of condemnation by United States without filing eminent domain and course of conduct by United States employees paralyzed private landowner's use of and ability to sell unimproved property and constituted taking); *Benenson v. United States*, 548 F.2d 939 (Ct.Cl. 1977) (four-year cloud of condemnation and totality of governmental actions constituting obstacles to use of property held to result in taking for which just compensation should be paid); *Drakes Bay Land Company v. United States*, 424 F.2d 574 (Ct.Cl. 1970) (five-year cloud of condemnation without filing eminent domain and government effectively blocking access to subject property held to constitute taking).

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[9] By affirming the grant of summary judgment against the petitioner, the Appeals Court not only fails to afford the careful scrutiny which the Supreme Court indicates such claims should receive, it ignores its own dictates in doing so. *See Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983):

> The fact-intensive nature of just compensation jurisprudence to date, however disorienting in other contexts, argues against precipitous grants of summary judgment. 723 F.2d at 887.

See also Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1560 (Fed. Cir. 1985): " . . . whether or not there has been a taking, even if not so intended, is normally a fact issue that cannot be resolved except on a 'complete record,' or a trial."

The instant case affords an important opportunity to the Supreme Court to provide clarity and direction to this area of the law. Rarely does the private citizen find himself on equal footing with a governmental body in the taking context — the resources of the government, whether local, state and particularly federal, simply outweigh what is available to the private citizen. The facts of the case for which petitioner seeks certiorari graphically demonstrate how big government can put a private citizen's rights on "hold" — here for 12 years — whatever the motivation (or lack of motivation) of that government may be. By speaking to these facts the Supreme Court can help to strike the balance that the Fifth Amendment intends to exist between the private property rights of the individual citizen and any government which seeks to take some of those rights for a public purpose.

Respectfully submitted,

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APPENDIX

APPENDIX I

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1125

EUGENIE J. HUGER

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: June 16, 1987

Before MARKEY, Chief Judge, COWEN and BALDWIN, Senior Circuit Judges.

MARKEY, Chief Judge.

DECISION

The order of United States Claims Court, No. 586-85L (Nov. 6, 1986), dismissing Eugenie J. Huger's complaint in light of a motion of the United States for summary judgment on the ground that the action of

the government did not constitute a taking of private property, is affirmed.

OPINION

Huger proffered no evidence tending to establish that she had any distinct investment-backed expectation with which the government interfered. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Huger's allegation that the government has paralyzed her ability to sell or develop the subject tract (Tract 23(c)) is without support in the record. Indeed, Huger concedes that she did not attempt to sell or develop Tract 23(c) at any time during the negotiation period with the government. Moreover, Huger submitted nothing tending to establish that she attempted to make any use whatever of the land during that period. Huger's allegation that any attempt to develop or sell the land during the negotiation period would have been "futile" is also without support in the record.

Huger's argument that the government improperly hung a "cloud of condemnation" over Tract 23(c) during the long period of unsuccessful negotiations is without merit. Huger has not alleged that the government negotiated at any time in less than good faith. Now that the government has initiated formal condemnation proceedings in the district court, Huger will be awarded just compensation.

The evidence submitted by Huger merely suggests that the government's action may have lessened the market value of the tract,

> but impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking. At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential

> purchaser's does not entitle the owner to compensation under the Fifth Amendment.

Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 15 (1984) (citations and footnote omitted).

The Claims Court correctly applied the appropriate standards in granting the government's motion for summary judgment. See *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986). Indeed, at oral argument before this court, Huger was unable to identify anything in the record establishing a genuine issue of material fact requiring a trial. Huger has shown no error in the Claims Court determination that the "accumulation of events recited by [Huger] do not show the type of interference with [Huger's] right to possess, use, or convey Tract 23(c) that would amount to a taking." Accordingly, the judgment appealed from is affirmed.

APPENDIX II

IN THE UNITED STATES CLAIMS COURT

No. 586-85L

(Filed: November 6, 1986)

EUGENIE J. HUGER

v.

THE UNITED STATES

THIS ORDER WILL NOT BE PUBLISHED IN THE U.S. CLAIMS COURT REPORTER BECAUSE IT DOES NOT ADD SIGNIFICANTLY TO THE BODY OF LAW AND IS NOT OF WIDESPREAD INTEREST.

ORDER

Pursuant to order, oral argument was heard on November 5, 1986, on defendant's motion to dismiss, or in the alternative, for summary judgment, filed May 2, 1986. Inasmuch as defendant's motion, and plaintiff's response, included matters outside the pleadings, under RUSCC 12(b) defendant's motion was treated as one for summary judgment, and disposed of as provided in RUSCC 56.

The information submitted with the motion papers included depositions, internal memoranda of the Fish and Wildlife Service (FWS), correspondence between the parties and a variety of other materials. None of the materials included in the motion papers were excluded by the court. The information contained in the motion papers is a comprehensive presentation of facts that

apply to plaintiff's claim that there was a taking of plaintiff's property rights in Tract 23(c) on April 22, 1981.

The question of whether a taking has occurred is fact-intensive and a complete record is required, normally by means of a trial. The factual nature of taking cases argues against precipitous grants of summary judgment. *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed. Cir. 1983). Summary judgment, however, is an integral part of the rules and in an appropriate case serves a useful function.

One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, ____ U.S. ____, 106 S.Ct. 2548, 2553 (1986). The summary judgment procedure serves judicial economy, it saves the time and expense of a full trial when it is unnecessary. When the material facts are adequately developed in the motion papers, a full trial is useless. "Useless" in this context means that more evidence than is already available in connection with the motion for summary judgment could not reasonably be expected to change the result. *Pure Gold, Inc. v. Syntec (USA), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984); *U.S. Steel Corp. v. Vasco Metals Corp.*, 394 F.2d 1009 (CCPA 1968).

The factual evidence and argument of counsel were considered under the standards enunciated in *Celotex Corp. v. Catrett*, ____ U.S. ____, 106 S.Ct. 2548, and the gloss there given to *Adickes v. Kress*, 398 U.S. 144 (1970). The summary judgment rule mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. A complete failure of proof concerning an essential element of the nonmoving party's case entitles the moving

party to judgment as a matter of law. *Celotex Corp. v. Catrett*, ____ U.S. at ____, 106 S.Ct. at 2553. A movant for summary judgment has the burden of showing the absence of genuine issues as to any material facts. *Adickes v. Kress*, 398 U.S. at 159. This does not mean that the burden is on the movant to produce evidence showing the absence of a genuine issue of material fact with respect to an issue on which the nonmoving party bears the burden of proof. The movant's burden may be discharged by showing that there is an absence of evidence to support the nonmoving party's case.

A material fact is one which will make a difference in the result of a case. *See Curtis v. United States*, 144 Ct.Cl. 194, 199, 168 F.Supp. 213, 216 (1958), cert. denied, 361 U.S. 843 (1959). The substantive law identifies the facts that are material. *Anderson v. Liberty Lobby Inc.*, ____ U.S. ____, 106 S.Ct. 2505, 2510 (1986).

On the basis of the facts available in the motion papers, and the argument of counsel, for the reasons stated at close of argument, no genuine issue of material fact is present in this case. Disposition by summary judgment is appropriate.

The land at issue, Tract 23(c), is undeveloped and unused open savanna and timbered upland containing 280.04 acres, zoned R-1, Single Family Residential, located within the planned acquisition boundaries of the Mississippi Sandhill Crane National Wildlife Refuge. The refuge was established August 30, 1973, to protect the Mississippi Sandhill crane, listed as an endangered species. The designation of the Critical Habitat of the Mississippi Sandhill crane includes the refuge and approximately 2,000 acres located outside the refuge. No special zoning, land use classification or restrictions apply to any land privately owned within the Critical Habitat boundary, either inside or outside the refuge boundary. The Endangered Species Act, 16

U.S.C. : 1531-43 (1982), requires all federal agencies to insure that actions authorized, funded, or carried out by them do not adversely affect the Critical Habitat.

Plaintiff alleges that a cumulation of events and governmental actions resulted in a taking of Tract 23(c) on April 22, 1981. The Supreme Court has identified three factors for use in analysis of a taking claim: (1) the economic impact of the regulation or governmental action on the claimant; (2) the extent to which the regulation or action has interfered with distinct investment-backed expectations; and (3) the character of the government action. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The nature or character of the government's action is the determining factor in this case as to the allegation there has been a taking. The accumulation of events recited by plaintiff do not show the type of interference with plaintiff's right to possess, use, or convey Tract 23(c) that would amount to a taking. The facts show a period of partially unsuccessful negotiations on fair market values, in good faith, from 1974 to April 22, 1981; a suspension of negotiations because of a funding moratorium until September 1984; and a renewal of negotiations, that, when unsuccessful, culminated in defendant's commencement of condemnation proceedings on November 1, 1985. Entirely absent is any evidence of affirmative acts by defendant or its personnel that would deprive plaintiff of her rights and amount to a taking. *See e.g. Benenson v. United States*, 548 F.2d 939, 947 (Ct.Cl. 1985); *Althaus v. United States*, 7 Cl.Ct. 688 (1985). At most, the facts show that the parties could not agree on what was the fair market value of Tract 23(c) at various times. The facts before the court do not show that plaintiff was deprived of the right to market or develop Tract 23(c) as of the alleged taking date April 22, 1981. The facts do not show that actions by the government created a substantial or burdensome inter-

ference with plaintiff's rights, or that plaintiff had no viable economic use of Tract 23(c) as of the alleged taking date.

Plaintiff provided no evidence that it attempted to sell its land, had distinct investment-backed expectations for the land, or that the government's action somehow precluded plaintiff's use of the land. On the facts presented, for the reasons stated at the close of argument, there was no taking by inverse condemnation of Tract 23(c) on April 22, 1981, nor at any other time. Plaintiff will be compensated for its fair market value in the condemnation proceeding. Whether restrictions on federal funding that may result from the Endangered Species Act may constitute a taking must be determined on different facts. Accordingly,

IT IS ORDERED:

Defendant's motion for summary judgment is ALLOWED and the clerk is directed to dismiss the complaint. No costs.

/s/ Kenneth R. Harkins
Kenneth R. Harkins, Judge

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1125

EUGENIE J. HUGER

Plaintiff-Appellant,

vs.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES CLAIMS COURT

in CASE NO(S). 586-85L

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED JUN 16 1987 /s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: July 7, 1987